TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~392~~.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED NOVEMBER 21, 1871.

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INDEX.

	Original.	Print.
Style of court	1	1
Summons	2	1
Narr	4	2
Rule: Plea	21	8
Plea	22	8
Agreement	23	9
Judgment	24	9
Bill of exceptions:		
Admission of facts	25	9
Mortgage	26	10
Paper marked "A."	37	14
Form of bond	38	14
Plaintiffs' prayers	40	15
Defendant's prayers	41	15
Writ of error	44	16
Citation	46	17
Clerk's certificate	47	17

1 THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

At a circuit court of the United States for the fourth circuit in and for the Maryland district, begun and held at the United States court-house in the city of Baltimore, on the first Monday in April, (being the third day of the same month,) in the year of our Lord one thousand eight hundred and seventy-one—

Present, the Honorable William F. Giles, judge Maryland district; Archibald Stirling, esquire, attorney; Edward Y. Goldsborough, esquire, marshal; James W. Chew, clerk—

Among other were the following proceedings, to wit:

THE UNITED STATES OF AMERICA
vs.
THE BALTIMORE & OHIO RAILROAD COMPANY.

Be it remembered that, heretofore, to wit, on the second day of April, in the year of our Lord one thousand eight hundred and seventy, the said United States of America, by Archibald Stirling, esquire, United States attorney for the district of Maryland, prosecuted and sued forth out of the circuit court here, the writ of the United States of
2 America, of summons, directed to the marshal of the district aforesaid, in the words and of the tenor following, to wit:

THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

To the marshal for the Maryland district, greeting:

THE SEAL OF THE CIRCUIT COURT, MD.

We command you that you summon The Baltimore and Ohio Railroad Company, that all excuses and delays set aside, it be and appear before the judges of the circuit court of the United for the fourth circuit, in and for the Maryland district, to be held at the United States court-house, in the city of Baltimore, on the first Monday in April, instant, to answer unto the United States of America in a plea of trespass on the case, &c.

Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable S. P. Chase, Chief Justice of our Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and sixty-nine.

Issued the 2nd day of April, A. D. 1870.

JAMES W. CHEW,
Clk District Court.

3 At which mentioned first Monday in April, in the year of our Lord one thousand eight hundred and seventy, and the day of the return of the aforegoing writ, comes into the circuit court here, the said United States, by their attorney aforesaid, and the marshal of the district aforesaid, to wit, Edward Y. Goldsborough, gentleman, to whom the said aforegoing writ was in form aforesaid directed, makes return thereof to the court here thus endorsed, to wit:

"Summoned—

"E. Y. GOLDSBOROUGH,
"*U. S. Marshal.*"

And the said Baltimore and Ohio Railroad Company being called, appeared in court here by John H. B. Latrobe, esquire, its attorney.

And thereupon the said defendant, by its attorney aforesaid, prays that the said plaintiffs may declare against it, the said defendant, in the plea aforesaid. Whereupon it is ruled by the court here, that the said plaintiffs declare against the said defendant in the plea aforesaid, or judgment will be rendered against them by default.

Whereupon the said plaintiffs, by their attorney aforesaid, declared against the defendant in the plea aforesaid, in form following, to wit:

4 *Declaration.*

UNITED STATES OF AMERICA,
District of Maryland:

In the circuit court U. S. for the fourth circuit, and for the Maryland district.

The United States of America, the plaintiffs in this case, by Archibald Stirling, jr., their attorney, complain of The Baltimore and Ohio Railroad Company, (the defendant in this case,) who was summoned to answer the plaintiffs of a plea of trespass upon the case upon premises.

For that whereas, The Baltimore and Ohio Railroad Company is, and heretofore, for a space of thirty years' time and upwards, hath been a corporation incorporated by the laws of the said State, having its principal office of business located therein, and a citizen thereof.

And whereas, by an ordinance of the mayor and city council of Baltimore, passed on the 27th day of September, 1853, it was (amongst other things) ordained and provided that, whenever the said defendant should, in the mode therein provided, signify, in writing and under its corporate seal, its acceptance of the terms and provisions of the said ordinance, and should at the same time deposit with the register of the city
5 a mortgage, pledging all the real and personal estate of the said company, their road or roads, with their tolls and revenues, as security to the mayor and city council of Baltimore for the payment, as thereinafter provided, of the principal and interest of the loan thereby made, it should be the duty of the commissioners of finance of the said city to issue certificates of stock of the mayor and city council of Baltimore, in the form of five per cent. sterling bonds, payable in London, or six per cent. currency bonds payable in Baltimore, at their discretion, with coupons or otherwise, (in their discretion,) to the amount of five millions of dollars, redeemable on the 1st day of January, 1890; the interest payable quarterly, on the 1st day of January, April, July, and October, in each year; and to proceed to sell the said bonds or certificates on the best terms which they could obtain, not less than par, in such sums as might be required by said Baltimore and Ohio Railroad Company, and pay over the proceeds thereof to the register of the city of Baltimore.

And further provided, ordained, and authorized the city register of said city to pay to the defendant the amount of money he might receive from time to time from the said commissioners of finance on account of the sale of said certificates, reserving ten per cent. thereof to be used as a sinking fund, to pay the principal of their said loan at ma-
6 turity. And whereas it was also provided by the said ordinance that the acceptance thereof by the said company in the manner therein provided, and the execution of the mortgage required to be given by the defendant, as aforesaid, should be construed and understood as obligatory upon the said company to pay to the said register

the principal sum of five millions of dollars issued under the provisions of said ordinance, less the amount of the said sinking fund, and its accumulations in the manner therein provided, and also to pay to the said city register interest at the rate of six per cent. per annum on the whole amount of said certificates or bonds so issued quarterly, and in advance, at least ten days previous to the days of the several months aforesaid, upon currency bonds; which said payments should commence to be made in advance of the first payments which shall be required to be made by the mayor and city council of Baltimore on said certificates or bonds, and should continue to be made as aforesaid until the payment by the defendant to the mayor and city council of Baltimore, of the principal sums of money which should be issued as aforesaid.

And whereas the said ordinance was, by an act passed by the general assembly of Maryland, on the 1st day of March, 1854, chapter 34,
7 confirmed, and full power thereby conferred on the mayor and city council of Baltimore, and upon the commissioners of finance, and the register of the said city, to carry into effect all the provisions of the said ordinance in the same manner, to all intents and purposes, as if the said mayor and city council had been, previously to the passage of the said ordinance, authorized and empowered by an act of the general assembly of Maryland, to enact an ordinance in the precise terms of the ordinance above recited at length, and to provide for carrying the same into effect; the said act to take effect upon its passage.

And whereas the defendant did duly signify, in writing, under its corporate seal, its acceptance of the terms and conditions of the said ordinance, and at the same time deposit with the register of the said city a mortgage pledging all the real and personal estate, roads, tolls, and revenues as security to the mayor and city council of Baltimore for the payment as therein provided of the principal and interest of the said loan of five millions of dollars; and whereas the said commissioners did decide to issue six per cent. currency bonds, payable at the city of Baltimore, and the proceeds of the said last-mentioned certificates or bonds, amounting in all to five millions of dollars, less the said
8 sinking fund, accordingly were paid over to and received by the defendant, and all the conditions, stipulations, and provisions of the said ordinance having been fully complied with and performed, the defendant, by force of the provisions thereof, became bound to pay to the holders of said bonds the interest upon the said loan of five millions of dollars at the rate of six per centum per annum, quarterly at the days and times before mentioned, that is to say, the said defendant became bound to pay, to wit, to the holders of said bonds the sum of three hundred thousand dollars per annum until the 1st day of January, 1890, in quarterly payments of seventy-five thousand dollars each at the days and times mentioned in the said ordinance, of all which said promises the said defendant, after the making of the said ordinance and the confirmation thereof by the general assembly of Maryland, and after the execution and delivery of the said mortgage, and after the compliance with and performance of all the conditions, stipulations and provisions of the said ordinance as aforesaid had notice.

And the plaintiffs in fact say that, by means of all and singular the aforegoing premises, the defendant became and was
9 and yet is indebted in manner and form aforesaid, for the said sum of five millions of dollars; and also that for the said debt, bond of indebtedness, (to wit, the aforementioned certificates,) upon which interest was (and is) stipulated to be paid, to wit, six per cent.

currency interest payable at the city of Baltimore, were issued in manner and form, as hereinafter recited.

And the plaintiffs aver that the defendant, on the 1st day of April, 1864, at said city, by force and effect of the eighth section of the act of Congress, entitled "An act to amend an act entitled 'An act to provide internal revenue to support the Government, and pay interest on the public debt, approved July 1st, 1862,' and for other purposes," approved March 3rd, 1863, became and was subject to pay and indebted to the plaintiffs in the sum of $2,250.00 *cts.* for and on account of a tax (by the same section of said act levied) of three per centum of the amount of all the interest upon the said bonds for said debt of five millions of dollars, (so stipulated to be paid as aforesaid,) which was, not only according to the tenor of the aforementioned ordinance payable, but was also, in truth and in fact paid, on the said 1st day of April, in said year of our Lord 1864, which same interest amounted to the sum of $75,000.00 *cts.*

10 And the said plaintiffs aver that the defendants, afterwards, to wit, on the first day of July, 1864, by force of the said eighth section of said last mentioned act of Congress, became and was subject to pay and indebted to the plaintiffs in the sum of $2,250.00 *cts.*, for and on account of the tax (by the same section of said act levied) of three per centum of the amount of all the interest, (which interest amounted to seventy-five thousand dollars,) upon said debt, payable, and in fact paid, on the day and year last aforesaid.

And the plaintiffs aver that the defendants, afterwards, to wit, on the first day of October, 1864, by force and effect of the 122nd section of the act of Congress, entitled "An act to provide internal revenue to support the Government, and pay interest on the public debt and for other purposes," approved June 30th, 1864, A. D., became and was indebted to the plaintiffs in the further sum of $3,750.00 *cents*, for and on account of the tax (by the said 122 section of the last-mentioned act levied) of five per centum of the amount of the interest on the said debt of five millions of dollars, payable, and in fact paid, by the defendant, on the first of October, in last-mentioned year (said interest being then and there of the amount of seventy-five thousand dollars.)

11 And the plaintiffs aver that the defendants, afterwards, to wit, on the first day of January, 1865, by force of said 122 section of said last-mentioned act, became and was indebted to the plaintiffs in the further sum of $3,750.00 *cents*, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on the said debt of five millions of dollars, payable, and in fact paid, by the defendants, on the day and year last aforesaid, said interest being in the amount of seventy-five thousand dollars.

And the plaintiffs aver that the defendants, afterwards, to wit, on the 1st day of April, 1865, by force of said last-mentioned section and act, became and was indebted to the plaintiffs in the further sum of $3,750.00 *cents*, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on the said debt of five millions of dollars, payable, and in fact paid, by defendants, on the day and year last aforesaid, which same interest amounted to the sum of seventy-five thousand dollars.

And the plaintiffs aver that the defendants, to wit, on the 1st day of July, 1865, by force of said 122 section of said last-mentioned act, became and was indebted to the plaintiffs in the further sum of

12 $3,750.00, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on the said debt of

five millions of dollars, payable, and in fact paid, by defendant, on the day and year last aforesaid, and which same interest amounted to seventy-five thousand dollars.

And the plaintiffs aver that the defendant, afterwards, to wit, on the 1st day of October, 1865, by force of the 122 section of said last-mentioned act, became and was indebted to the plaintiffs in the further sum of $3,750.00, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on the said debt of five millions of dollars, payable, and in fact paid, by defendants, on the day and year last aforesaid, which same interest was in amount seventy-five thousand dollars.

And the plaintiffs aver that the defendant, afterwards, to wit, on the 1st day of January, 1866, by force of the 122 section of said last-mentioned act, became and was indebted to the plaintiffs in the further sum of $3,750.00, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on the said debt of five millions of dollars, payable, and in fact paid, by the defendant, on the day and year last aforesaid, which same interest amounted to the
13 sum of seventy-five thousand dollars.

And the plaintiffs aver that the defendant, afterwards, to wit, on the 1st day of April, 1866, A. D., by force of the 122 section of said last-mentioned act, became and was indebted to the plaintiffs in the further sum of $3,750.00, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on the said debt of five millions of dollars, payable, and in fact , by the defendant, on the day and year last aforesaid, which same interest amounted to seventy-five thousand dollars.

And the plaintiffs aver that the defendant, afterwards, to wit, on the 1st day of July, A. D. 1866, by force of the said 122 section of said last-mentioned act, became and was indebted to the plaintiffs in the further sum of $3,750.00, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on said debt of five millions of dollars, payable, and in fact paid, by defendant, on the day and year last aforesaid, which same interest amounted to the sum of seventy-five thousand dollars.

And the plaintiffs aver that the defendant, afterwards, to wit, on the 1st day of October, 1866, by force of said 122 section of said last-mentioned act, became and was indebted to the plaintiffs in the fur-
14 ther sum of $3,750.00, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on the said debt of five millions of dollars, payable, and in fact paid, by defendant, on the day and year last aforesaid, which same interest amounted to the sum of seventy-five thousand dollars.

And the plaintiffs aver that the defendant, afterwards, to wit, on the 1st day of January, 1867, by force of the 122 section of said last-mentioned act, became and was indebted to the plaintiffs in the further sum of $3,750.00, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on the said debt of five millions of dollars, payable, and in fact paid, by the defendant, on the day and year last aforesaid, and which same interest amounted to seventy-five thousand dollars.

And the plaintiffs aver that the defendant afterwards, to wit, on the 1st day of April, 1867, by force of the 122d section of said last-mentioned act, became and was indebted to the plaintiffs in the further sum of $3,750.00, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on said debt of five millions of

dollars, payable, and in fact paid, by defendant, on the day and year last aforesaid, which interest amount to seventy-five thousand dollars.

15 And the plaintiffs aver that the defendant, afterwards, to wit, on the 1st day of July, 1867, by force of the 122 section of said last-mentioned act, became and was indebted to the plaintiffs in the further sum of $3,750.00, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on the said debt of five millions dollars, payable, and in fact paid, by the defendant, on the day and year last aforesaid, which same interest amounted to seventy-five thousand dollars.

And the plaintiffs aver that the defendant, afterwards, to wit, on the 1st day of October, 1867, by force of said 122 section of said act last mentioned, became and was indebted to the plaintiffs in the further sum of $3,750.00, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on said debt of five millions of dollars, payable, and in fact paid, by defendant, on the day and year last aforesaid, which interest amounted to the sum of seventy-five thousand dollars.

And the plaintiffs aver that the defendant, afterwards, to wit, on the 1st day of January, 1868, by force of said 122 section of said last-mentioned act, became and was indebted to the plaintiffs in the

16 further sum of $3,750.00, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on the said debt of five millions of dollars, payable, and in fact paid, by the defendant, on the day and year last aforesaid, which interest amounted to the sum of seventy-five thousand dollars.

And the plaintiffs aver that the defendant, afterwards, to wit, on the 1st day of April, 1868, by force of the said 122 section of said act, became and was indebted to the plaintiffs in the further sum of $3,750.00, on account of the tax (by the same section levied) of five per cent. of the amount of the interest of said debt of five millions dollars, payable, and in fact paid, by the defendant, on the day and year last aforesaid, which same interest amounted to the sum of seventy-five thousand dollars.

And the plaintiffs aver that the defendant, afterwards, to wit, on the 1st day of July, 1868, by force of said 122 section of said last-mentioned act, became and was indebted to the plaintiffs in the further sum of $3,750.00, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on the said debt of

17 five millions of dollars, payable, and in fact paid, by defendant, on the day and year last aforesaid, which same interest amounted to the sum of seventy-five thousand dollars.

And the plaintiffs aver that the defendant, afterwards, to wit, on the 1st day of October, 1868, by force of said 122 section of said last-mentioned act, became and was indebted to the plaintiffs in the further sum of $3,750.00, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on said debt of five millions of dollars, payable, and in fact paid, by the defendant, on the day and year last aforesaid, which same interest amounted to the sum of seventy-five thousand dollars.

And the plaintiffs aver that the defendant, afterwards, to wit, on the 1st day of January, 1869, by force of said 122 section of said last-mentioned act, became and was indebted to the plaintiffs in the further sum of $3,750.00, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on the said debt of five millions of dollars, payable, and in fact paid, by defendant, on the day and year

last aforesaid, and which interest amounted to the sum of seventy-five thousand dollars.

18 And the plaintiffs aver that the defendant, afterwards, to wit, on the 1st day of April, 1869, by force of said 122 section of said last-mentioned act, became and was indebted to the plaintiffs in the further sum of $3,750.00, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on the said debt of five millions of dollars, payable, and in fact paid, by the defendant, on the day and year last aforesaid, which same interest amounted to the sum of seventy-five thousand dollars.

And the plaintiffs aver that the defendant, afterwards, to wit, on the 1st day of July, 1869, by force of said 122 section of said last-mentioned act, became and was indebted to the plaintiffs in the further sum of $3,750.00, on account of the tax (by the same section levied) of five per cent. of the amount of the interest on the said debt of five millions of dollars, payable, and in fact paid, by the defendant, on the day and year last aforesaid, which same interest amounted to the sum of seventy-five thousand dollars.

And the plaintiffs aver that the defendant, afterwards, to wit, one the 1st day of October, 1869, by force of the said 122 section of said last-mentioned act, became and was indebted to the plaintiffs in

19 the sum of $3,750.00, for and on account of the tax (by the same section levied) of five per centum of the amount all the interest upon said bonds for said debt of five millions, which was, not only according to the tenor of the aforementioned ordinance payable, but was also, in truth and in fact, paid, on said 1st day of October in said year 1869, A. D., which interest amounted to the sum of seventy-five thousand dollars.

And the said plaintiffs aver that the defendant, afterwards, to wit, on on the 1st day of January, A. D. 1870, by force of said 122d section of said last-mentioned act of Congress, became and was subject to pay and indebted to the plaintiffs in the further sum of $3,750.00, for and on account of a tax (by the same section of said act levied) of five per cent. of the amount of all interest upon said bonds, for said debt of five millions dollars, which was, not only to the tenor of the aforementioned ordinance payable, but was, in fact, paid, on the day and year last aforesaid, and which interest amounted to the sum of seventy-five thousand dollars.

And the said plaintiffs in fact say that the said defendant, being to them indebted in the said several sums of money in that regard,

20 hereinbefore in this count mentioned, the defendant, afterwards, to wit, on the day and year last aforesaid, at the said city, undertook and faithfully *to* promised to pay them the said several sums of money, when said defendant should be thereto requested. Nevertheless the said defendant, not regarding their said undertaking and promise, hath not yet paid the said several sums of money, or any of them, or any part thereof to the plaintiffs, although often requested so to do; but to pay the same, or any part thereof, hath hitherto altogether refused and yet refuse.

COUNT SECOND.

And whereas also the said defendant, afterwards, to wit, on the day and year last aforesaid, at the city of Baltimore, in the district aforesaid, was indebted to the plaintiffs in the further sum of eighty-seven thousand dollars, lawful money of the United States, for so much money

by the said defendant before that time had and received to and for the use of the said plaintiffs, the said defendant then and there undertook and faithfully promised the plaintiffs to pay to them the said last-mentioned sum of money when thereto afterwards requested. Never-
21 theless, the defendant, not regarding his said last-mentioned promise and undertaking, hath not yet paid to the plaintiffs the same sum of money, or any part thereof, though thereto often requested, but to pay the same hath refused and still refuse.

And thereupon the said plaintiffs, by their attorney aforesaid, pray that the said defendant may answer to the declaration of them, the said plaintiffs, in the plea aforesaid; whereupon it is ruled by the court here that the said defendant answer to the declaration of the said plaintiffs in the plea aforesaid, or judgment will be rendered against it by default.

And the said defendant, by its said attorney, defends the force and injury, when, &c., and prays leave of the court here to imparle until the first Monday in November next, and it hath it; the same day is given to the said plaintiffs then and there, &c.

At which said first Monday in November, in the year last aforesaid, until which day the said defendant had leave to imparle, and then to answer the declaration of the said plaintiffs in the plea aforesaid, come again into the circuit court here, the parties aforesaid, by their attorneys aforesaid.

And the said defendant prays leave of the court here further
22 to imparle until the first Monday in April next, and it hath it; the same day is given to the said plaintiffs then and there, &c.

At which said first Monday in April, in the year of our Lord one thousand eight hundred and seventy-one, until which day the said defendant had leave to imparle, and then to answer the declaration of the said plaintiffs in the plea aforesaid, come again into the circuit court here, the parties aforesaid, by their attorney saforesaid.

Whereupon the said defendant, by their attorney aforesaid, filed in court here the following plea, to wit:

Plea.

THE UNITED STATES
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } In the circuit.

The defendants, by their attorney, come here into court and say that they did not promise, as alleged in the first count of plaintiffs, and to the second count these defendants say that they are not indebted as therein charged.

JNO. H. B. LATROBE,
For Def'ts.

23 And afterwards, to wit, on the 8th day of April, in the year last aforesaid, the parties aforesaid, by their attorneys, file in the said circuit court here the following agreement, to wit:

Agreement.

THE UNITED STATES
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

It is agreed by the parties to this cause that it be submitted to be tried and determined by the court, without the intervention a jury, as authorized by the act of Congress of March 3, 1865, in like case made and provided.

A. STIRLING, JR.,
Att'y for Pl'ffs.
JNO. H. B. LATROBE,
For Def'ts.

And afterwards, to wit, on the 12th day of April, in the year last aforesaid, the court passes the following order, to wit:

Order.

24 In the circuit court of the United States, 4 circuit and district of Maryland. April term, 1871.

THE UNITED STATES
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

This case being submitted to the court here under the provisions of the act of Congress, passed March 3rd, 1865, and on a written statement of facts, and the counsel of the respective parties having been heard, and the court having duly considered the facts of the case, does now decide that there is no sum of money due by the defendant to the plaintiff, and that judgment be entered for the defendant, but without costs.

WILLIAM F. GILES.

Therefore it is considered by the court here that the said plaintiffs take nothing by their said writ, but that they be, in mercy for their false complaint, and that the said defendant go thereof without day, &c.

MEMORANDUM.—Before the judgment aforesaid was rendered in this case, the said United States of America, by their attorney aforesaid, tendered to the court here the following bill of exceptions, and
25 which is by the court here signed and sealed, and which is in form following, to wit:

Bill of exceptions.

In the circuit court of the United States for the Maryland district.

THE UNITED STATES
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY.

The plaintiff and defendant, by their respective counsel, made the following admission of facts, which was read in evidence accordingly:

In circuit court U. S. for the [redacted]t of Maryland.

UNITED STATES
vs.
BALT'O. & OHIO R. R. CO.

The following statement of facts is agreed upon by the respective counsel:

1st. That the mayor and city council of Baltimore, having full authority from the legislature for the purpose, passed the ordinance No. 5, approved December 27th, 1853, entitled "An ordinance to aid the Baltimore and Ohio Railroad Company by a loan to the amount of five
26 million of dollars to complete their road to the city of Wheeling, to fund their debts, and especially to lay a track as far as Piedmont, 218 miles distant from the city of Baltimore."

2. That the said ordinance may be read in evidence on the trial in any stage of the above cause from the printed ordinances of the city aforesaid as well as the act of the legislature of Maryland confirming it.

3. That, in pursuance of the provisions of said ordinances, the bonds of said city therein authorized were prepared, issued, and sold, and the proceeds paid as required, less the ten per cent. provided as a sinking fund by the terms of the ordinance.

4. That the said company executed the mortgage required by said ordinance, of which mortgage the following is a copy:

The Baltimore and Ohio Railroad Company mortgage to the mayor and city council of Baltimore.

This indenture, made this sixteenth day of February, in the year eighteen hundred and fifty-four, between the Baltimore and Ohio Rail-
road Company, of the first part, and the mayor and city council
27 of Baltimore, of the second part.

Whereas and ordinance was enacted by the said mayor and city council of Baltimore, approved on the 27th day of December, 1853, and entitled "An ordinance to aid the Baltimore and Ohio Railroad Company by a loan to the amount of five millions of dollars to complete their road to the city of Wheeling, to fund their debts, and especially to lay a second track as far as Piedmont, 218 miles distant from the city of Baltimore," the tenth section of which ordinance enacted that it should have no effect until confirmed by the general assembly of Maryland then next ensuing the date of said ordinance:

And whereas, at the present January session of the year 1854, an act has been passed by the said general assembly entitled "An act to confirm an ordinance of the mayor and city council of Baltimore entitled 'An act to aid the Baltimore and Ohio Railroad Company by a loan to the amount of five millions of dollars to complete their road to the city of Wheeling, to fund their debt, and especially to lay a second track as far as Piedmont, 218 miles distant from the city of Baltimore,' and to
confer upon said mayor and city council and upon the commis-
28 sioners of finance and the register of said city the powers necessary for carrying into effect the provisions of said ordinance," by which said act of the general assembly the same validity was given to the said ordinance, as if the said mayor and city council had been, previously to the passage of the said ordinance, authorized and empowered by an act of the said general assembly to enact an ordinance in the precise terms of the ordinance above recited at length, and

to provide for carrying the same into effect; the said act so as aforesaid passed stipulating that nothing therein or in said ordinance contained should be taken or construed to impair or lessen in any manner the liens or securities which the State of Maryland had in the revenue of the said Baltimore and Ohio Railroad Company for loans heretofore made by the said State to the said company, or for the interest due or that might become due thereon to the said State;

And whereas the said Baltimore and Ohio Railroad Company, by their officers legally authorized to act on their behalf in such matters, having signified in writing, sealed with their corporate seal, their acceptance of the terms and provisions of said ordinance as required to do by the first section thereof, do now propose to deposit with
29 the register of the said city a mortgage, (previously to be approved by the city councillor,) wherein they shall pledge all their real and personal estate, road or roads, the tolls and revenues as security to the said mayor and city council for the payment as provided in the said ordinance of the principal and interest of the loan made by said ordinance:

Now this indenture witnesseth that The Baltimore and Ohio Railroad Company, for and in consideration of the premises and for the purpose of fully complying on their part with the requisitions in all respects of the said ordinance and act of assembly, and in further consideration of the sum of five dollars to them in hand paid by the said mayor and city council of Baltimore at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, assigned, transferred, and made over to the mayor and city council of Baltimore aforesaid all their the said Baltimore and Ohio Railroad Company's real and personal estate, road or roads, the tolls and revenues with the appurtenaces:

To have and to hold the said real and personal estate, road or roads, the tolls and revenues, with the appurtenances, to the said The
30 mayor and city council of Baltimore in as full and ample a manner as the said Baltimore and Ohio Railroad Company are entitled to have and to hold the same as security to the mayor and city council of Baltimore for the payment, as provided in the ordinance aforesaid, of the principal and interest of the loan made thereby: Provided, nevertheless, and it is the *interest* and meaning of the parties to these presents, that, if the said Baltimore and Ohio Railroad Company do and shall pay to the register aforesaid the principal sum of five millions of dollars issued under the provisions of said ordinance, less the amount of the sinking fund provided for therein, and its accumulations mentioned in the third section of the said ordinance, at least once a month before the * * * day on which the certificates or bonds directed by said ordinance to be issued shall become redeemable, and shall also pay to the said register interest at the rate of six per cent. per annum on the whole amount of said certificates or bonds issued quarterly and in advance at least ten days previous to the first days of the several months mentioned in said ordinance on currency bonds, and thirty days previous to aforesaid first days on sterling bonds; which said payment shall commence to be made in advance of the first payments of interest,
31 which shall be required to be made by the mayor and city council of Baltimore on said certificates or bonds, and shall continue to be made as aforesaid until the repayment by the said company to the mayor and city council of Baltimore of the principal sums of money which shall or may be issued as aforesaid.

And if the said Baltimore and Ohio Railroad Company do and shall

well and truly, in the event of the said commissioners of finance electing to issue 5-per-cent. sterling bonds, pay all other expenses incidental to such payment, as well as all and any expense incidental to the issue of any of the honds, whether currency or sterling as aforesaid, and shall pay the expense of recording, under the direction of the city register, this indenture of mortgage in the proper offices of record where such instruments are recorded, in all counties, districts, cities, or towns, whether in the State of Maryland or out of it, wherein said company have any real or personal estate, road or roads, toll or revenues, then and in these events, these presents shall be null and void; else to remain in full force and effect; it being understood that, until a failure to comply with their obligations in the premises, the said Baltimore &
32 Ohio Railroad Company shall be permitted to have and enjoy the possession of the property hereby mortgaged, and to receive and take the income and revenues thereof.

And this indenture further witnesseth that the said Baltimore and Ohio Railroad Company hath appointed, and by these presents doth hereby appoint Joshua J. Atkinson as their attorney, to acknowledge this indenture to be their act and deed, to the end that the same may recorded according to law.

In testimony whereof the president of the said company hath hereto set his hand and caused the seal of the said company to be affixed hereto the day and year first above written.

W'M G. HARRISON. [SEAL'S PLACE.]
Pres't B. & O. R. R. Co.

Signed, sealed and delivered in presence of—
JOHN H. B. LATROBE.
JOSEPH J. ATKINSON.
W'M N. BRICE.
EDW'D J. PETERS.

STATE OF MARYLAND,
Baltimore City, to wit:

On this 16th day of February, in the year 1854, before the sub-
33 scribers, two justices of the peace of the said State in and for said city, personally appeared Joshua J. Atkinson, who, we are satisfied of our own knowledge, is the party named and described as the attorney in the foregoing indenture named, and in pursuance of the authority therein given, acknowledge' the *the* same indenture to be the act and deed of the Baltimore and Ohio Railroad Company; and, at same time, before us personally appeared John J. Graves, an officer of the corporation of the mayor and city council of Baltimore, and register thereof, and made oath according to law that the consideration set forth in the indenture of mortgage aforesaid is true and bona fide as therein set forth.

Acknowledged before—

W'M N. BRICE.
EDW'D J. PETERS.

I approve of the foregoing mortgage.

BENJ'N C. PRESSTMAN,
Counsellor for the City.

STATE OF MARYLAND,
City of Baltimore, ss:

I, James B. Latimer, a commissioner appointed by the governor of the State of Virginia for the State of Maryland aforesaid, do cer-

34 tify that W'm G. Harrison, president of the Baltimore and Ohio Railroad Company, whose name*d* is signed to the writing above, bearing date the sixteenth day of February, eighteen hundred and fifty-four, has acknowledged the same before me in my State aforesaid.

In testimony whereof I have hereunto subscribed my name and affixed my seal of office as commissioner aforesaid this sixteenth day of February, eighteen hundred and fifty-four.

[SEAL'S PLACE.] JA'S B. LATIMER,
Commissioner.

STATE OF MARYLAND,
Baltimore City, sct:

I hereby certify that William N. Brice and Edward J. Peters, esquires, before whom the annexed acknowledgement and affidavits were made, and who have thereto subscribed their names, were, at the time of so doing, two justices of the peace of the State of Maryland in and for the city of Baltimore, duly commissioned and sworn.

In testimony whereof I hereto set my hand and affix the seal
35 of the superior court of Baltimore City this 16th day of February, A. D. 1854.

[SEAL'S PLACE.] EDW'D DOWLING,
Clerk of the Superior Court of Baltimore City.

Rec'd 16th February, 1854, of grantee, six dollars, in lieu of stamps under act 1846, ch. 61.

EDW'D DOWLING, *Clk.*

Received to be recorded the 16th day of February, 1854, at 5 o'clock p. m. Same day recorded and examined.

Per EDWARD DOWLING, *Clk.*

STATE OF MARYLAND,
City of Baltimore, sct:

I hereby certify that the aforegoing is truly transcribed from liber E. D., No. 49, folio 230, &c., one of the land records of Baltimore City.

In testimony whereof I hereto set my hand and affix the seal of the superior court of Baltimore City, on this 5th day of September, A. D. 1864.

[SEAL'S PLACE.] ALFORD MACE, *Clk.*

[5-ct. int. rev. stamp.]

36 5. That the said company paid the interest on said bonds as provided by said ordina'ce regularly until the 1st July, 1862.

6. That after the day last aforesaid, the company paying the interest aforesaid, according to the tenor of their obligations in that regard, deducted the internal revenue tax imposed by the act of Congress relating thereto—or claimed to be imposed—the said city, by its register, always contending that the United States had no right to collect the tax, and bringing the action against the said company for the amount so retained, which suit was ultimately taken by writ of error to the Supreme Court U. S. on the 1st Monday in December, 1867. Pending said suit the said city always insisted that the deduction aforesaid was unauthorized by law and awaited the decision of the Supreme Court aforesaid.

7. That no payment of the amount deducted as aforesaid has been made, either to the said city or the United States since January, 1864.

8. It is admitted that the city in paying the interest on the bonds aforesaid has paid it to holders in full without reservation or deduction on account of the internal revenue tax.

9. It is admitted that the first assessments made since the year
37 1864, is that which is stated in the paper herewith ma'ked A.

Paper marked A.

Name.	Location and P. O. address.	Article or occupation.	No. in abstract.	Quantity or valuation.	Rate of tax	Am't of tax upon particular articles.
		ASSESSED UPON DECEMBER LIST, 1869.				
Balto. & Ohio R. R. Co.	Camden Station.	Int. on 5 million loan, Oct., '68	137	75,000	5%	3,750 00
		Interest, Jan'y, '69	137	75,000	5%	3,750 00
		Interest, April, '69	137	75,000	5%	3,750 00
		Interest, July, '69	137	75,000	5%	3,750 00
		Interest, Oct., '69	137	75,000	5%	3,750 00
		ASSESSED UPON NOVEMBER LIST, 1870.				
		Interest, Jan'y, '70		75,000	5%	3,750 00
		Interest, April, '70		75,000	5%	3,750 00
		Interest, July, '70		75,000	5%	3,750 00

10. It is admitted that the said city has notified the said company not to pay the amount demanded on this suit, and has appeared by its counsel to contest the same.

38 11. And it is admitted that the following is the form of the bond issued by the mayor and council of Baltimore to the purchasers of the same, under the provisions of the ordinance aforesaid.

Form of bond.

CITY OF BALTIMORE.

No. .] [$

Five million Loan, 1890.

Six per cent.

This is to certify that the mayor and city council of Baltimore are indebted to in the sum of dollars, redeemable on the first day of January, 1890, on the presentation and surrender of this certificate, with interest thereon in the meantime, at the rate of six per centum. per annum, payable quarter-yearly on the first days of January, April, July, and October, in each year.

This certificate is issued by virtue of the ordinance of the mayor and city council of Baltimore, entitled "An ordi-
39 nance to aid the Baltimore and Ohio Railroad Company, by a loan to the amount of five millions of dollars, to complete their road to the city of Wheeling, to fund their debts, and especially to lay a second track as far as Piedmont, 218 miles distant from the city of Baltimore," and is only transferable at the mayor's office in person or by attorney, and on the delivery of this certificate to the transferee.

Interest to commence from the day of , 18 .

Redeemable on the first day of January, 1890.

In witness whereof I, the mayor of the city of Baltimore have hereunto set my hand and affixed the seal of the said corporation this day of in the year of our Lord eighteen hundred and fifty.

Mayor.

Countersigned and registered.

Register.

12. It is admitted that during the time mentioned in the above-statement, the mayor and city council of Baltimore held large amounts of stock in the Baltimore and Ohio Railroad Company.

12. It is also admitted that all laws and ordinances in that connection may be had from the volumes in which they are contained.

40 JNO. H. B. LATROBE,
For Def't.
A. STIRLING, J'R,
U. S. Att'y.

Whereupon the plaintiff', by their counsel, offered the following prayers:

Prayers.

The plaintiff', by their counsel, pray the court to determine that, upon the facts in this cause and upon the true construction of the internal revenue laws of the United States, the defendant was bound to deduct and pay to the United States the tax of three per cent. of the amount of interest payable to the city on the mortgage and ordinance offered in evidence for the period stated in the aforesaid statement of facts during which the said laws levied a tax of 3 per cent., and was bound to deduct and pay as aforesaid the tax of five cent. for the period stated in the said statement of facts during which the said laws levied a tax of 5 per cent., and that the defendant having retained the said tax in paying the interest to the city is admitted by the said statement, the
41 plaintiff is entitled to recover on this action the amount of said tax so deducted and retained by the defendant.

(Rejected.)

And the defendant, by their counsel, offered the following prayers:

Prayers.

1. The defendants, by their counsel, prayed the court that there is nothing in the facts of this case to shew that there is any privity of contract between the holders of the bonds, issued under the ordinance of the mayor and city council and the defendants, and that consequently the plaintiffs are not entitled to recover on the first count of the declaration.

(Granted.)

2. That the bonds issued under the ordinance offered in evidence created a contract between the holders thereof and the mayor and city council of Baltimore, the proceeds of said bonds going into the treasury of the city to be paid out as required by the defendant. That the mort-

gage offered in evidence was to secure to the said city the payment of the principal and interest of the loan of the said city to the defendants, and that the mortgage given by the defendants to the city was
42 not such an evidence of indebtedness as was taxable; said mortgage being the property of a municipal corporation.

(Granted.)

3. That, by the provisions of the act of Congress of July 13, 1866, section 9, there can be no recovery for unpaid taxes, unless the assessor shall, within fifteen months from the time of the delivery of the list to the collector, enter upon any monthly or special list the name of such person or persons omitted, together with the amount of tax for which they have been or may become liable, and shall certify and return such list to the collector; and that inasmuch as no such return appears to have been made prior to the month of December, 1869, the plaintiff cannot, if at all, recover for any amount that might have been due prior to fifteen months from said time.

(Rejected.

The court rejected the prayer of the plaintiff, and granted 1st and 2d prayers of the defendant, and rejected defendant's 3rd prayer.

To the granting of which prayers of the defendant, as well as to the rejection of the plaintiff' prayer, the plaintiff, by their counsel, prayed leave to except, and that the court would sign and seal this their
43 bill of exceptions; which the court do this twelfth day of April, in the year 1871.

WILLIAM F. GILES. [SEAL.]

And now, here, at this day, to wit, the 20th day of May, in the year of our Lord 1871, the said United States of America produced to the circuit court here, the writ of the United States of America, for the correction of errors of and upon the premises, commanding the record and proceedings aforesaid of the judgment aforesaid, so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the first Monday in December next; which writ of error is in the words and of the tenor following, to wit:

Writ of error.

44 THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

[SEAL.] The President of the United States of America to the judges of the circuit court for the fourth circuit, in and for the district of Maryland, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said court before you or some of you, between The United States of America, plaintiffs, and The Baltimore and Ohio Railroad Company, defendant, a manifest error hath happened, to the great damage of the said United States, as by their complaint appears: We, being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that

you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

45 Witness the Honorable Salmon P. Chase, Chief Justice of our Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and seventy.

Issued the 20th day of May, A. D. 1871.

JAMES W. CHEW,
Clerk Circuit Court.

46 The United States of America to the Baltimore and Ohio Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fourth circuit in and for the Maryland district, wherein The United States of America are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said United States in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in this suit.

Witness my hand and seal this sixteenth day of October, in the year of our Lord one thousand eight hundred and seventy-one.

WILLIAM F. GILES. [SEAL.]

Service acknowledged this 20th day of October, A. D. 1871.
JNO. H. B. LATROBE, *For D't.*

47 In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with said writ of error, are hereby transmitted to the said Supreme Court, accordingly.

In testimony that the aforegoing is a true transcript, taken and made from the record and proceedings of the circuit court aforesaid, I hereunto subscribe my name and affix the seal of the said circuit court this 2nd day of November, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.]

JAMES W. CHEW,
Clerk Circuit Court.

(Indorsement on cover:) No. 392. The United States, plaintiffs in error, vs. The Baltimore & Ohio Railroad Company. Maryland C. C. U. S. Filed 21st November, 1871.

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Due To

CONDITION OF ORIGINAL

In the Supreme Court of the United States.

DECEMBER TERM, 1872.

THE UNITED STATES
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 159.

In Error to the Circuit Court of the United States for the District of Maryland.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

DECEMBER TERM, 1872.

THE UNITED STATES
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY. } No. 159.

In Error to the Circuit Court of the United States for the District of Maryland.

BRIEF FOR THE UNITED STATES.

The question presented by this case is, whether the defendant is liable for a tax upon certain interest payable by it in 1864 and after, to the City of Baltimore, secured by a mortgage.

In 1854, in accordance with an agreement between them the company mortgaged its road, &c., to indemnify the city against a debt which it was to incur for certain bonds issued in aid of the company. The mortgage required the company to provide the city, from quarter day to quarter day, with the amount needed to pay the interest on such bonds, and, at last, with what may be needed to pay the principal.

The company has retained from its quarterly payments to the city the amount claimed for tax as above, but, because of a protest by the city against its payment, it has not been passed over to the Government.

The form of action is *assumpsit*. The first count in

the declaration recites the above transaction in detail, concluding that "the defendant, by force of the provisions [of said mortgage] became bound to pay to the holders of said bonds, [those issued by the city,] the interest upon the said loan," &c., (Record, p. 3,) and, so, that upon various consecutive quarter days, beginning with April 1, 1864, and ending with January 1, 1870, the defendant owed for tax upon such interest, in all, $87,000. The *second* count is for $87,000, *money had and received*, &c.

The defendant pleaded *the general issue.*

The prayers for instruction by the defendant that were granted by the court, cover the whole ground, so that it will not be necessary to consider the prayer by the plaintiff, which was *rejected* by the court.

WE ASSIGN FOR ERROR:

1. The instruction that, if there were a want of privity between *the holders of the bonds* and the defendant, the plaintiffs could not recover on the first count.

2. The instruction that the mortgage was not taxable because it was the property of a *municipal* corporation.

I.

The first instruction by the court was, "that there is nothing in the facts of this case to show that there is any privity of contract between the holders of bonds issued under the ordinance of the mayor and city council of the defendants; and, that consequently, the plaintiffs are not entitled to recover on the first count of the declaration."

We may admit the alleged want of privity; but we

submit that the *consequence* stated by the court does not follow.

As regards the *pleading* in the first count, we submit that the conclusion *of law* drawn from the full statement of the facts of the transaction between the city and the company, which is contained in such count, is not material. Pleading is a statement of *facts only*. Conclusions under a *virtute cujus*, as above, are not traversable, (Setph. Pl., 192; Chitty Pl., 1, 612;) and unless the proposition of law expressed therein would be material to the success of the pleader, even when *not expressed*, its expression is surplusage. If the facts alleged justify another conclusion of law, and such other conclusion is consistent with a right of recovery, the plaintiff is entitled to judgment.

We submit that it may well be that, from the facts stated in such count, the proper conclusion of law is, that "the defendant, by force of the provisions of said mortgage, became bound to pay to said *City of Baltimore* the interest," &c., and yet the case stated be one in which a "railroad company is indebted for money, for which an evidence of indebtedness—viz., a mortgage—has been issued, payable in one or more years after date, upon which interest is stipulated to be paid," and, therefore, a case within the plain words of the 122d section of the act of June 30, 1864.

1. We suppose that it will not be denied that a mortgage deed is an "evidence of debt." We find no case in which that phrase has been applied to it, or been rejected. The common expression is, that it is a *security* for debt. (Rex *vs.* Powell, 14 Eng. L. & E., 575.)

It is a *security*, because it is first an *evidence*, and often, and we suppose from the record *here*, the *only* evidence of it.

2. If this be so, is there any reason to say that the tax is not leviable because the creditor is BALTIMORE—a *municipal corporation?*

We admit that *municipal corporations*, acting merely within the scope of their duties as such, are not to be included within general words imposing taxes upon *persons* or *corporations.*

We submit, as a commentary upon the above admission, that whatever *person*, (*municipal corporation* or other,) at all events less than a sovereign, engages in a business not strictly municipal, or a part of the Government machinery, does so upon the terms of taking its share of whatever burdens public policy imposes upon such business, or upon any means requisite to carrying it on. Cities, counties and similar municipalities cannot engage in *private* business, except upon the terms that *private* people do.

Where general words, such as *person*, are used to describe a taxpayer, the proper extent of the exceptions under consideration is that no municipality engaged in mere municipal duties is to be included. For the exception is not an express exception, but an exception in reason; and the above is the extent of the reason. (Bailey *vs.* Mayor of New York, 3 Hill., pp. 539, &c.; City of Louisville *vs.* Commonwealth, 1 Duvall, Ky., 295.)

This reasoning applies most strictly to the act of 1864 before its amendment.

3. The amendatory act of 1866 (14 Stats., 141, as to section 154 of act of 1864) gives expression to this idea, providing, in lieu of section 154 of act of 1864—

"That all official instruments, documents, and papers issued by the officers of the United States Government, or by the officers of any State, county, town, or other municipal corporation, shall be, and hereby are, exempt from taxation: *Provided*, That it is the intent hereby to exempt from liability to taxation such State, county, town, or other municipal corporation in the exercise only of functions strictly belonging to them in their ordinary governmental and municipal capacity."

If the above *proviso* is to be regarded as more than *declaratory* of what the law was previously, it includes within its remedial action all payments of interest by the railroad company mentioned in the *declaration* as made after October 1, 1866.

It is said that it may be very *difficult* in practice to administer the distinction between what is *strictly municipal* and what is *not*. In a complicated and refined society, *law* will have to meet and respond to such difficulties at every turn. It will be an unfit organ of such a body if it ignore them. The reply to this objection of "difficulty" is that made by Chief Justice Marshall, in Brown *vs.* Maryland, (12 Wheat., 419,) so often and so recently approved in this court. (See Low *vs.* Austin, 13 Wallace, 29:)

"The power, and the restriction of it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise."

An essential distinction between *municipal* and *private* corporations is, that the former are created irrespective of the consent of those who are associated therein. An analysis of this proposition shows that *municipal powers* are corporate powers that can be conferred (or imposed) without the consent of the associated; whilst other such powers cannot. Powers strictly municipal are given or withheld upon grounds which concern the public at large; and therefore the town or county particularly affected is not consulted. The extraordinary powers *generally* conferred upon these bodies are conferred only where the body gives its assent. It may turn out hereafter that a third class of such powers shall be marked, such (say) as cannot be conferred or imposed without the unanimous vote of the municipality affected. But that at present is only speculation.

The cases decided have drawn a distinction, as above, between the classes which exist. (Bailey *vs.* Mayor of New York, by Nelson, C. J., pp. 539, &c.)

The transaction by the city of Baltimore now under consideration, is not one strictly municipal. The city could not have been compelled to it. Its assent was necessary. Upon its face, the action required a special law for its authorization. (City of Aurora *vs.* West, 22d Ind., 88.) "Aurora was and is a municipal corporation, and therefore, on general principles of law, could not, without special authority, subscribe stock and issue bonds in payment of it, in a railroad corporation," (p. 94.) Such a transaction, therefore, may be a legitimate object of taxation; and, whether it be in-

cluded in a particular tax act is to be decided by an application of the ordinary rules of statutory construction. (City of Louisville *vs.* Commonwealth, 1 Duvall, 295.)

We may now pass to a consideration of the question, whether the transaction before us, between the city and the railroad company, is one which, under the spirit and reason of the internal revenue act, would be taxable, supposing that the place now occupied by the city were occupied by a private corporation or by a natural person?

It is plainly an *investment* by the city. That it borrowed all the money which it lent, and that it lent it for no more interest than it was to pay, does not prevent the transaction from being pecuniarily a profitable one to the party so borrowing and lending.

The city is not a mere surety for the railroad company. If it were, that would prevent an inquiry into what profits it made from its position, unless they came under the head of "income." There would, *prima facie*, be no income. But here, on the face, there is an income, and what devolves upon the Government is to show that the income answers to a probable and anticipated profit to the city arising from the transaction. The situation of the city is not really that of an accommodation acceptor. The profits to the city from the borrowing of the $5,000,000 are little less certain than those to the company. The enlargement of the means of transit over the road will increase the wealth of the city as certainly as that of the company.

The city went out upon the street to borrow this

money *for its gain*, and although that gain is not evidenced by an increase of interest exacted in the relending, yet it exists and gives substance to that which already wants no exterior feature of *a loan*, in which it was the creditor and a railroad company the debtor.

We have submitted to the suggestion made in this suit upon behalf of the defendant, that this is not a transaction in which the holders of the city bonds are creditors of the company, having the city for surety. We claim for the Government, upon another part of the case, the *benefit* of the same view.

By the form of the transaction, the company is debtor to the city, and is not known by the holders of the city bonds. Under the same form, the company has executed an "evidence of debt" to the city, and upon investigation it appears that the consideration for this evidence of debt, was advanced by the city upon a reasonable and very probable calculation of profit to itself. The transaction is not a single one, by which only the principal debtor and the creditor are benefited. Profit accrues for different parties at different points, and the transaction has accordingly a double aspect.

Double taxation, although said to be, *per se*, not unconstitutional, is, no doubt, invidious, and not to be presumed; but where a transaction has several *stages*, and at each of them a fresh profit occurs, taxation repeated at every such stage seems to be in every way reasonable.

II.

The second prayer of the defendants (which was also *granted*) was—

"That the bonds issued under the ordinance offered in evidence created a contract between the holders thereof and the mayor and the city council of Baltimore, the proceeds of said bonds going into the treasury of the city, to be paid out as required by the defendant. That the mortgage offered in evidence was to secure to the said city the payment of the principal and interest of the loan of the said city to the defendants, and that the mortgage given by the defendants to the city was not such an evidence of indebtedness as was taxable; said mortgage being the property of a municipal corporation."

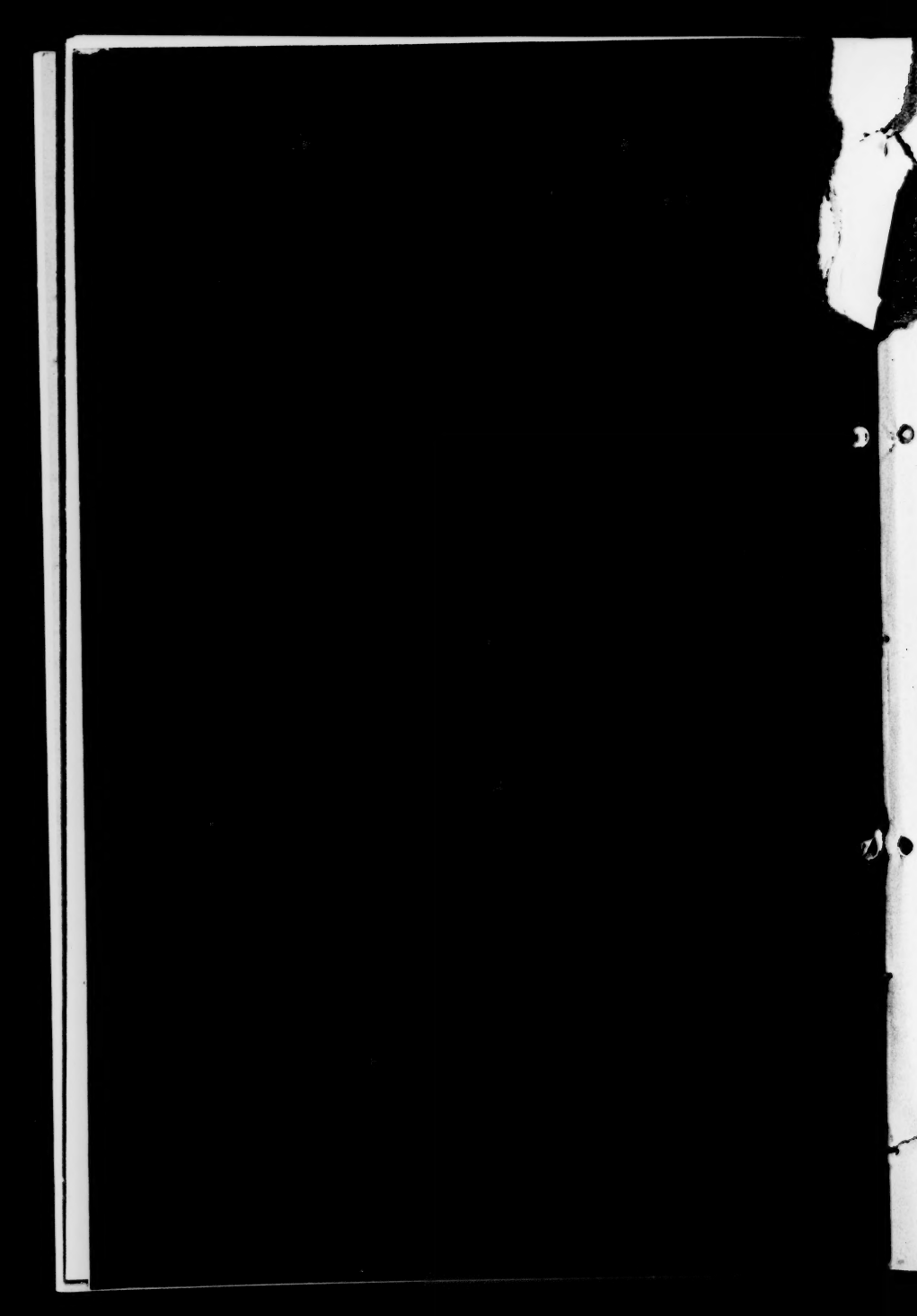
We have already assigned reasons for submitting that the property of a municipal corporation not held for purposes strictly municipal is taxable. The question in any particular case seems to be, Is the object taxed so much *public* property as, that, in levying the tax, the United States substantially taxes only *itself* or *Maryland*—according to the suggestion of Lord Denman in The Queen *vs.* Liverpool, 9 A. & E., 434, (442.) "The Public, in one case, is the same town of Liverpool; in the other, the county of Chester." See Grant, Corp., (285;) The Queen *vs.* Exminster, 12 A. & E., 2; The King *vs.* Commissioners, &c., 4 T. R., 730; where, however, something turns upon the language of the statutes under consideration.

The details of this argument have been applied to the first count in the declaration. If the court shall think

that there are technical reasons why they cannot be so applied, it seems that, at all events, there are none why they are not pertinent to the second count, in view of the fact that the defendant below actually retained the tax with which it is charged.

GEO. H. WILLIAMS,
Attorney General.

S. F. PHILLIPS,
Solicitor General.



December Term, 1872.

No. 159.

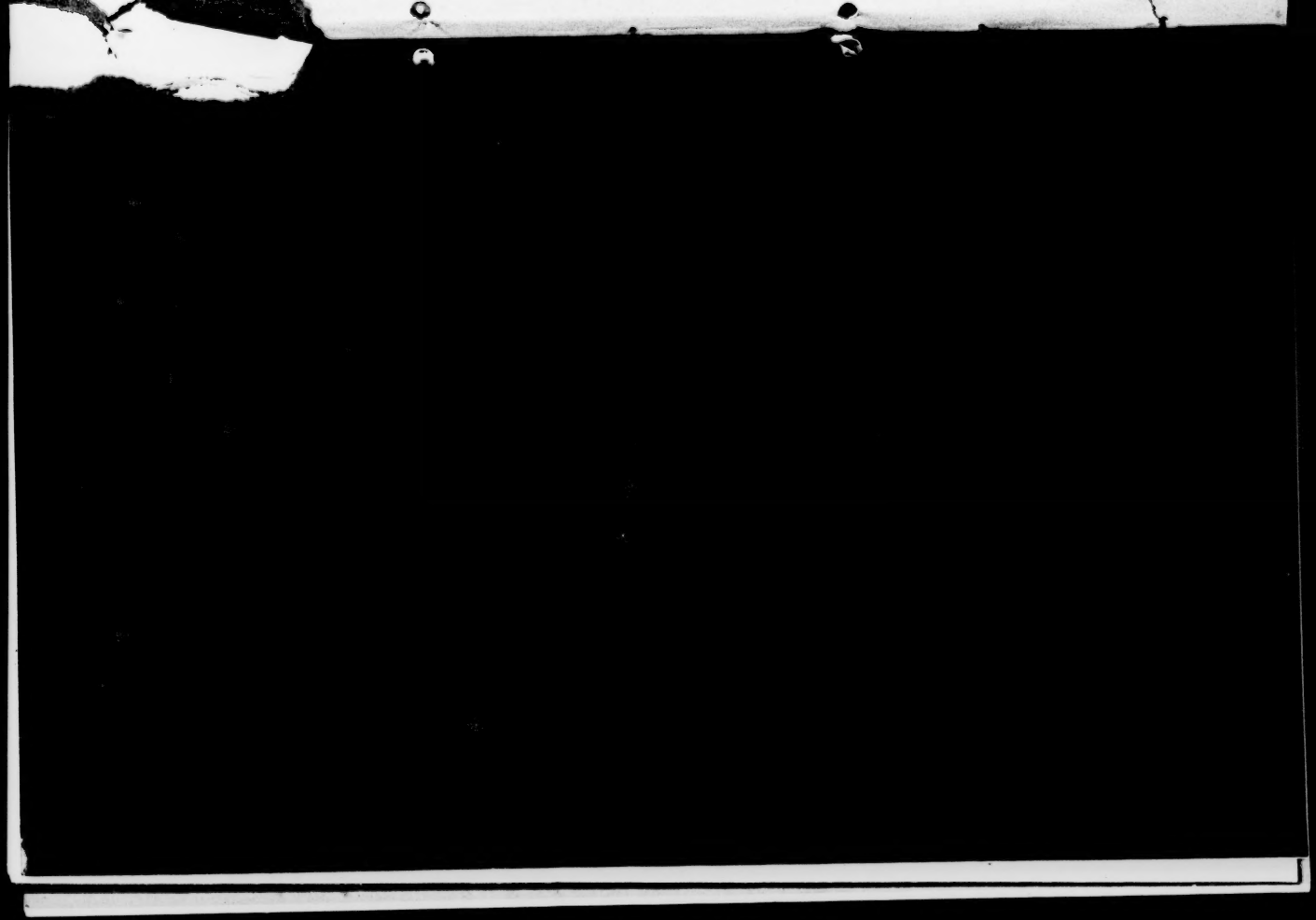
THE UNITED STATES,
PLAINTIFFS IN ERROR,

vs.

THE BALTIMORE & OHIO RAIL ROAD CO.

In the Supreme Court of the United States, in Error to the Circuit Court of the United States for the District of Maryland.

BRIEF OF DEFENDANT IN ERROR.



December Term, 1872.

No. 159.

THE UNITED STATES,
PLAINTIFFS IN ERROR,

vs.

THE BALTIMORE & OHIO RAIL ROAD CO.

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This is the case which is reported in 10th Wallace 543, in another aspect. Under an ordinance of the Mayor and City Council of Baltimore passed September 27th 1853, *bonds of the city to the amount of $5,000,000, were issued redeemable in 1890, bearing interest payable quarterly on the first days of January, April, July and October, to enable the city to pay a subscription to that amount, to the B. & O. R. R. Co. These bonds were to be sold by the Commissioners of Finance of the city, and the proceeds paid over to the Defendants in Error, less ten per cent. reserved as a sinking fund.—For the payment of these bonds,

*Whenever the Baltimore and Ohio Railroad Company, by their officers legally authorized to act on their behalf in such matters, shall signify in writing, sealed with their corporate seal, their acceptance of the terms and provisions of this ordinance, and shall, at the same time, deposit with the register of the city a mortgage (to be previously approved by the city counsellor,) wherein said company shall pledge all their real and personal estate, road or roads, the tolls and revenues, as security to the Mayor and City Council of Baltimore, for the payment, as hereinafter provided, of the principal and of the interest of the loan hereby made, it shall be the duty of the Commissioners of Finance of the city of Baltimore, and they are hereby authorized to issue certificates of stock of the Mayor and City Council of Baltimore, with coupons or otherwise, in their discretion, to the amount of five million of dollars, redeemable on the first day of January, 1890; the interest payable quarterly on the first days of January, April, July and October in each year; the said Commissioners likewise to use their discretion, whether to issue five per cent. sterling bonds, payable in London, or six per cent. currency, payable in the city of Baltimore, and shall proceed to sell the said bonds or certificates on the best terms which they can obtain therefor, not less than par, and in such sums as may be required by said Rail Road Company, and pay over the proceeds thereof to the register of the city; and it is hereby understood and provided, that if the Commissioners of Finance shall, at any time, elect to issue five per cent. sterling bonds, as aforesaid, the cost of exchange, commission to agent in London, and all other expenses incidental to such payment shall be chargeable to and paid by the President and Directors of the Baltimore and Ohio Rail Road Company aforesaid; and it is hereby further provided, that any and all expenses incident to the issue of any bonds, whether currency or sterling, as aforesaid, shall in like manner be chargeable to and paid by the said Rail Road Company.—No. 5, s. 1, City Code, p. 767.

The city register is hereby authorized to pay to the Baltimore and Ohio Rail Road Company the amount of money he may receive from time to time from the Commissioners of Finance, on account of the sale of said certificates, reserving ten per cent. thereof to be used as a sinking fund to pay the principal of said loan at maturity.—*Ibid.* s. 2.

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and interest according to their tenor, the Defendants in error mortgaged to the city all their real and personal estates, road or roads, the tolls and revenues with the appurtenances. (See Record p. 11.)

One of the conditions of the mortgage was, that in addition to the interest, the mortgagor should pay "all other expenses incidental to such payment as well as all and any expense incidental to the issue of any of the bonds, whether currency or sterling," together with the expense of recording, &c., &c., (See p. 12.)

After the passage by Congress of the Internal Revenue Act of 1864, the Defendants were notified that government would claim from them the tax of 5 per cent. subsequently reduced to 3 per cent thereby imposed--The city authorities when informed of this, refused to recognize it as giving the Railroad Company the right to retain the tax, and insisted upon the payment of the interest stipulated in the mortgage without deduction ; and the Defendants retaining the tax from the payments of interest to the city, were sued by it in the Superior Court of Baltimore City.—The case was taken by *certiorari* to the Circuit Court of the United States ; a verdict for the Defendants was rendered ; and a writ of error having carried the case to the Supreme Court of the United States, the judgment of the Court below was affirmed.

The Defendants in Error being thus released from the payment to the city, the United States commenced suit against them for the amount withheld, and having been defeated in the Circuit Court of the United States for the Maryland District, now come before the Supreme Court on the present writ of error.

The case was tried in the Court below, without a jury under the 4th Section of the Act of Congress of March 3rd, 1865 ; and was submitted on the statement of facts to be found at p. 10, of the Record.

The statement sets out the ordinance under which the bonds were issued—the preparation and issuing of the bonds—the mortgage given to secure them—the fact that the mortgagor paid the interest less the tax, the City always contending that the retention of it was unlawful—that the city paid the interest to the bondholders without deduction—that the City had given notice not to pay the tax to the United States—that the bond was of the form to be found at p. 14, of the Record, and that the City was a large holder of the stock of the Defendant in error.

There was an agreement that all laws and ordinances touching the subject matter of the testimony, might be read from the volumes in which they were printed.

The Plaintiffs in error, then offered the following prayer in substance—(see Record p. 15,) that upon the facts and the true

construction of the Revenue laws of the United States—the Defendants were bound to pay the tax, &c., and that having retained the tax in paying the interest to the city, the Plaintiff was entitled to recover the amount retained.

On the other hand the Defendant below, prayed the Court:

First.—That there was nothing in the facts of the case, to show that there was any privity of contract between the holders of the bonds issued under the ordinance of the Mayor and City Council and the Defendants, and that consequently the Plaintiffs could not recover.

Second.—That the bonds issued under the ordinance offered in evidence, created a contract between the holders thereof, and the Mayor and City Council: the proceeds of said bonds going into the treasury of the city, to be paid out as required by the Defendant. Thus the mortgage offered in evidence, was to secure the city, the principal and interest of the loan of the city to the Defendants, and that the mortgage given by the Defendants to the city, was not such an evidence of indebtedness as was taxable—said mortgage being the property of a municipal corporation. (See Record p. 16.)

There was a third prayer, which was refused, and which requires no notice here. The Defendants two prayers above set forth were granted—the prayer of the Plaintiff, refused.

This terminated the case in the Circuit Court for the Defendants, and the writ of error followed.

Two questions arise in this case, and were presented by the Defendants in the Court below.

1. The true construction of the Act of 1864, sec. 122, under which it was supposed the United States were authorized to assess and collect the tax.

2. The character of the subject matter proposed to be taxed, and whether it was liable under any circumstances.

The Act of 1864, sec. 122. does not purport to tax the railroad, steamboat and other companies therein mentioned. It was convenient to use them as collectors of the tax imposed upon their stockholders, and they were used accordingly. This is evident upon reading the section, and it was so held in *Jackson vs. Northern Central Railway Company*, 7 *Wallace*, 269.

In the case of *Haight vs. the Pittsburg, Fort Wayne and Chicago Railroad*, 6 *Wallace*, 17—the same doctrine was held under the Act of 1866, which differs from the law of 1864, only in extending the provisions of the Act of 1864, to interest and dividends due to aliens.

Nor must it be forgotten, here, that between the holders of the bonds of the city and the Defendants in error there is no

privity, in law, whatever—the privity is between the city and the Defendants. The bondholder's remedy is against the obligor; and although, were the city insolvent, he might claim in equity to be subrogated in the city's place, so as to obtain the benefit of the security held by the latter, yet, at law, he could have no such recourse.

The interest due therefore by the Defendants in Error is a debt due to the City, and not to the bondholders. It is so much property belonging to the City, the property of a muncipal corporation, and the question is, how it is to be regarded, in connection with the Revenue Laws.

The Act of 1864, does not by a fair construction, tax the income of corporations—their gross receipts it taxes 2½ per cent. It is their stockholders that it taxes 5 per cent., on their dividends or income from the corporations, and it makes the President and Directors the collectors of this, by the 122nd section.

It is true that the 49th section of the Act of 1864, would seem to place all persons, associations or corporations, "liable to pay a duty or tax," on the same footing: but this leaves the question of *liability* under the Act of Congress to pay a tax an open one—and the words "liable to pay a duty or tax" qualify the force of the section, and obviate a construction, which without them, it might be argued, the section was susceptible of.

Is the interest then, which the Defendants in Error owes to the City of Baltimore, liable to the income tax so called, under the Revenue Laws? It is not; because these laws do not in any way affect it, in terms, or by a fair construction. But it does not on an another ground, which is that taken by the second prayer of the Defendants below.

2. It does not lie within the power of Congress to tax the property of a municipal corporation.

Broad as is the authority given by the Constitution to Congress to tax, it is not without exceptions.

In the case of *Veazee Bank vs. Fenno*, 8 *Wallace* 547, the Supreme Court says, "It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through Executive action, to administer justice through the Courts, and to employ all necessary agencies for legitimate purposes of State Government are not proper subjects of the taxing power of Congress."

That the City of Baltimore comes within this exemption is substantially ruled in the case of *the State of Maryland vs. the Bal-*

timore and Ohio Rail Road Company, 3 *Howard* 550. "The several Counties," say the Court, "are nothing more than certain portions of territory into which the State is divided for the more convenient exercises of the powers of Government. They form together one political body in which the sovereignty resides."

In the *case of McCulloh vs. The State of Maryland*, the boundary between the power granted to Congress and that reserved to the State is clearly defined. "Each," say Taney, C. J., "is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised."

All then that has to be done in prosecuting this enquiry is to see whether the City, in the issue of its bonds under the circumstances, has acted within the scope of authority derived from the State so as to bring the property now sought to be taxed within the rulings here referred to.

That the State possessed the power to authorize the aid to be given which the issue of the bonds in question enabled it to give will not be denied. That it granted authority to that effect by the Act of 1854, adopting *ipsissimis verbis* the ordinance of the city, appears from an examination of the Act* and the ordinance. The power exercised in this case finds support in the case of *Gelpacke vs. the City of Dubuque*, 1 *Wallace* 202, *and Rogers vs. the City of Burlington*, 3 *Wallace* 664.

In the last case the Court say, "A Rail Road is nothing more than an improved highway, and that it is competent for the Legislature to authorise a municipal corporation to furnish material aid in the construction of a Rail Road connected with the same as to construct a highway."

The city then stands in the place of the State here; and the tax which the United States seeks to recover must be regarded as one which Congress had no right to impose, even if the Revenue laws in terms or by fair implication included it in their provisions.

*1854, c 34, provided that the above ordinance be hereby confirmed, and that full power be hereby conferred upon the Mayor and City Council of Baltimore, and upon the Commissioners of Finance and the register of the city of Baltimore, to carry into effect all the provisions of the said ordinance, in the same manner, to all intents and purposes, as if the said Mayor and City Council had been previously to the passage of said ordinance, authorized and empowered by an Act of the General Assembly to enact an ordinance in the precise terms of the above ordinance, and to provide for carrying the same into effect.

That nothing in this act or in the said ordinance contained, shall be taken or construed to impair or lessen in any manner the liens or securities which the State of Maryland has in the revenue of the said Baltimore and Ohio Railroad Company, for loans heretofore made by the said State to the said company or for the interest now due or that may become due thereon, to the said State.—*See City Code, p.* 779.

There is another ground of objection which is not to be overlooked. That the Bondholders are liable to the tax sought to be recovered from the Company is clear. It was their duty to include the interest reserved from the bonds held by them in their returns to the assessors. It is to be presumed they did so. To collect the same tax, or a tax on the same interest before it is paid to the bond holders, and to collect it as a part of the income tax from the bond holders after it is paid without deduction to the States too, would be to collect a double tax. That this was the purpose of Congress cannot be supposed. and no construction given to the Revenue laws that would have such an effect could be a just one.

JOHN H. B. LATROBE,
I. NEVITT STEELE,
For Defendants in Error.